Ahmad Jamaluddin bin Abd Majid v Rafidah bt Aziz & Ors

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 01(F)–11 OF 2008
RICHARD MALANJUM CJ (SABAH AND SARAWAK), AUGUSTINE PAUL AND ZULKEFLI FCJJ
24 MARCH 2009

Election — Election court — Judge — Jurisdiction — Whether election judge empowered to strike out defective petition without trial

Election — Objections — Nomination papers — Candidate filing two unsigned copies of nomination papers — Whether returning officer obliged to reject candidate's nomination — Whether returning officer conferred discretion whether to accept or reject such nomination — Elections (Conduct of Elections) Regulations 1981 reg 4(6)

Election — Petition — Presentation of — Matters that petitioner must satisfy in order to sustain petition — Twin requirements of s 32(b), whether satisfied — Election Offences Act 1954 s 32(b) — Elections (Conduct of Elections) Regulations 1981 reg 7(1), (4), (5)

Words and Phrases — 'liable to be rejected' — Elections (Conduct of Elections) Regulations 1981 reg 4(6)

The first respondent was the BN candidate in the 12th General Elections for the Parliamentary constituency of P67 Kuala Kangsar ('the constituency'). The first respondent, when filing her nomination papers in triplicate on nomination day, had only signed one copy leaving two unsigned copies, contrary to reg 4(5) of the Elections (Conduct of Elections) Regulations 1981 ('ECER'). The appellant, a voter in the constituency lodged an objection with the returning officer, the second respondent, on the ground that the first respondent had not signed the nomination papers. The returning officer, dismissed the objection pursuant to reg 7(4) of the ECER and proceeded to declare a contest between the first respondent and the PAS candidate. The first respondent subsequently won the seat with a majority of 1,458. The appellant filed a petition under s 34(a) of the Election Offences Act 1954 ('the Act') and sought to, inter alia, declare the election of the first respondent null and void on the ground that her nomination papers were defective and

should have been rejected by the returning officer on nomination day. The second and third respondents filed a notice of motion to strike out with costs the election petition on the ground that it failed to comply with r 4(1)(b) of the Election Petition Rules 1954 ('the Rules'). The first respondent raised a preliminary objection on grounds similar to those raised by the second and third respondents. In the High Court, the election judge found the petition defective as the appellant had failed to satisfy the requirements of r 4(1)(b) of the Rules read with s 32(b) of the Act. The election judge thus struck out the petition without a trial. The appellant appealed to the Federal Court.

Held, dismissing the appeal with costs:

(1) An election judge has the jurisdiction to strike out a defective election petition without the need to go through the process of a full hearing. *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 (followed); *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473 (referred) (see para 10).

(2) The twin requirements of s 32(b) of the Act as stated by the Federal Court in *Gan Joon Zin*'s case are: firstly, non-compliance with the provisions of any written law relating to the conduct of any election; and secondly, such non-compliance affected the result of the election. *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 (followed) (see para 11).

(3) By virtue of regs 7(1), 7(4) and 7(5) of the ECER, the following three matters must be satisfied by a petitioner to sustain an election petition: (i) only the decision of the returning officer accepting or rejecting an objection may be questioned in the petition; (ii) the objection must be of a type that falls within the provisions of reg 7(1); and (iii) the facts satisfying the twin requirements of s 32(b) of the Act must be stated (see para 12).

(4) In the instant case, the election was held in accordance with the principles of election law and the alleged non-compliance had not affected the result of election. Thus, the second requirement of s 32(b) of the Act was not satisfied. *Isahak Hamid v Mustapha* [1965] 2 MLJ 18 (referred); *Wong Chong Sang v Nga Kor Ming* (Civil Appeal No 01–24 of 2004(A)) (FC) (unreported) (referred) (see para 13).

(5) The appellant's petition was by itself defective as the mandatory requirements of r 4(1)(b) of the Rules were not met. The appellant's argument that the returning officer should have rejected the first respondent's nomination merely because two copies of her nomination papers were not signed was insufficient to sustain the prayer sought. The law does not impose on the returning officer an obligation to only

reject but confers a discretion whether to accept or reject. The words 'liable to be rejected' in reg 4(6) of the ECER expressly confers a discretion on the returning officer whether to accept or reject a nomination paper (see para 14).

(6) In the instant case, the returning officer's explanation in his affidavit showed that he had exercised his discretion judiciously in accepting the nomination papers of the first respondent. Further, the supporting documents presented together with the nomination papers were sufficient and cogent evidence that the first respondent consented to her nomination as a candidate for the constituency (see para 16).

[Bahasa Malaysia summary

Responden pertama adalah calon BN di dalam Pilihan Raya Umum ke 12 untuk kawasan pilihan raya Parlimen P67 Kuala Kangsar ('kawasan pilihan raya tersebut'). Responden pertama apabila memfailkan kertas-kertas penamaannya dalam tiga salinan pada hari penamaan tersebut, hanya menandatangani satu salinan sahaja dengan membiarkan dua salinan tidak ditandatangani, ini bertentangan dengan peraturan 4(5) Peraturan-Peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981 ('PPR'). Perayu, pengundi di kawasan pilihan raya tersebut mengemukakan bantahan kepada pegawai pengurus pilihan raya, responden kedua, atas alasan bahawa responden pertama tidak menandatangani kertas-kertas penamaan tersebut. Pegawai pengurus pilihan raya tersebut menolak bantahan berikutan peraturan 7(4) PPR dan meneruskan untuk mengisytiharkan pertandingan di antara responden pertama dan calon PAS. Responden pertama kemudiannya menang kerusi bertanding dengan majoriti sebanyak 1,458. Perayu memfailkan petisyen di bawah s 34(a) Akta Kesalahan Pilihan Raya 1954 ('Akta') dan memohon, antara lain, mengisytiharkan pemilihan responden pertama tidak sah dan terbatal atas alasan bahawa kertas-kertas penamaannya adalah cacat dan patut ditolak oleh pegawai pengurus pilihan raya pada hari penamaan. Responden-responden kedua dan ketiga memfailkan notis usul untuk membatalkan dengan kos petisyen pilihan raya tersebut atas alasan bahawa ia gagal untuk mematuhi k 4(1)(b) Peraturan-Peraturan Petisyen Pilihan Raya ('Peraturan-Peraturan'). Responden pertama membangkitkan bantahan awalan atas alasan yang serupa dengan yang dibangkitkan oleh responden-responden kedua dan ketiga. Dalam Mahkamah Tinggi, hakim pilihan raya mendapati petisyen tersebut cacat kerana perayu gagal untuk memenuhi kehendak k 4(1)(b) Peraturan-Peraturan yang dibaca bersama dengan s 32(b) Akta. Hakim pilihan raya oleh itu membatalkan petisyen tersebut tanpa perbicaraan. Perayu merayu kepada Mahkamah Persekutuan.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim pilihan raya mempunyai bidang kuasa untuk membatalkan

petisyen pilihan raya yang cacat tanpa keperluan untuk melalui proses pendengaran penuh. *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 (diikut); *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473 (dirujuk) (lihat perenggan 10).

(2) Keperluan kembar s 32(b) Akta seperti yang dinyatakan oleh Mahkamah Persekutuan di dalam kes *Gan Joon Zin* adalah: pertama, ketidakpatuhan dengan peruntukan terhadap mana-mana undang-undang bertulis berkaitan dengan penyelengaraan mana-mana pilihan raya; dan keduanya, ketidakpatuhan sebegitu menjejaskan keputusan pilhan raya tersebut. *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 (diikuti) (lihat perenggan 11).

(3) Mengikut peraturan-peraturan 7(1), 7(4) dan 7(5) PPR, tiga perkara berikut mesti dipenuhi oleh pempetisyen untuk mengekalkan petisyen pilihan raya: (i) hanya keputusan pegawai pengurus untuk menerima atau menolak sesuatu bantahan boleh dipersoalkan di dalam petisyen; (ii) bantahan mestilah sejenis yang terangkum dalam peruntukan peraturan 7(1); dan (iii) fakta yang memenuhi keperluan kembar s 32(b) Akta mestilah dinyatakan (lihat perenggan 12).

(4) Dalam kes ini, pilihan raya dijalankan mengikut prinsip-prinsip undang-undang pilihan raya dan dakwaan ketidakpatuhan tersebut tidak menjejaskan keputusan pilihan raya. Oleh itu, keperluan kedua s 32(b) Akta tidak dipenuhi. *Isahak Hamid v Mustapha* [1965] 2 MLJ 18 (dirujuk); *Wong Chong Sang v Nga Kor Ming* (Rayuan Sivil No 01–24 Tahun 2004(A)) (MP) (unreported) (dirujuk) (lihat perenggan 13).

(5) Petisyen perayu sendiri adalah cacat kerana keperluan mandatori k 4(1)(b) Peraturan tidak dipenuhi. Hujahan perayu bahawa pegawai pengurus patut menolak penamaan responden pertama semata-mata kerana dua salinan penamaannya tidak ditandatangani tidak mencukupi untuk mengekalkan permohonan yang dipohon. Undang-undang tidak mengenakan ke atas pegawai pengurus tanggungjawab hanya untuk menolak tetapi memberikan budi bicara sama ada untuk menerima atau menolak. Perkataan 'liable to be rejected' di dalam peraturan 4(6) PPR secara nyata memberikan budi bicara kepada pegawai pengurus sama ada untuk menerima atau menolak kertas penamaan (lihat perenggan 14).

(6) Dalam kes ini, penjelasan pegawai pengurus di dalam afidavitnya menunjukkan bahawa beliau telah menjalankan budi bicaranya secara bijak di dalam menerima kertas-kertas penamaan responden pertama. Selanjutnya, dokumen-dokumen yang menyokong dikemukakan bersama dengan kertas-kertas penamaan tersebut adalah mencukupi

dan keterangan jelas bahawa responden pertama bersetuju terhadap penamaan beliau sebagai calon untuk kawasan pilihan raya tersebut (lihat perenggan 16).]

Notes

For a case on election court generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 1974.

For a case on presentation of petition, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2049.

For cases on objections generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1980–1984.

Cases referred to

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729, FC (folld)

Hussein bin Ahmad v Tengku Razaleigh bin Tengku Mohd Hamzah & 3 Ors Kota Bharu High Court Election Petition No 33–6 of 1995 (unreported), HC (refd)

Isahak Hamid v Mustapha [1965] 2 MLJ 18, HC (refd)

Wan Sagar bin Wan Embong v Harun bin Taib [2008] 6 MLJ 473, FC (refd)

Wong Chong Sang v Nga Kor Ming Civil Appeal No 01–24 of 2004(A) (unreported), FC (refd)

Legislation referred to

Election Offences Act 1954 ss 32, 32(b), 34(a)

Elections (Conduct of Elections) Regulations 1981 regs 4, 4(5), (6), 6(2), 7, 7(1), (2), (3), (4)

Election Petition Rules 1954 r 4, 4(1), 4(1)(b)

Mohamed Hanipa bin Maidin (Aminuddin bin Zukipli, Zulqarnain bin Lukman, Zulmi bin Sabri and Yusnita bt Yusof with him) (Zainur Rijal Talha & Amir) for the appellant.

Mohd Hafarizam bin Harun (Badrul Hisham bin Abd Wahap, Shahir bin Ab Razak, Firoz Hussien bin Ahmad Jamaludin and Syed Faizal bin Syed Abdullah with him) (Ong, Hanim & Badrul) for the first respondent.

Amarjeet Singh a/l Serjit Singh (Senior Federal Counsel, Attorney General's Chamber) for the second and third respondents.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the decision of the election judge at the High Court in Ipoh in which the election petition filed by the appellant ('petitioner in the High Court') was struck out following a notice of preliminary objection raised by the first respondent and the notice of motion to strike out the election petition filed by the second and third respondents. Dr Haji

Khairuddin bin Dato' Haji Abdul Malik was the PAS candidate in the 12th General Election for a seat in the Parliamentary constituency of Kuala Kangsar ('the Constituency') which was held on 8 March 2008 whilst Rafidah bt Aziz, the first respondent was the Barisan National candidate. The second respondent was the returning officer for the constituency and the third respondent is the Election Commission. The first respondent was declared as the duly elected member of the constituency by polling 10,735 against the PAS candidate's 9,277 votes — a majority of 1,458. The appellant, a voter in the constituency and claiming the right to present this petition under s 34(a) of the Election Offences Act 1954 ('the Act') sought to declare the election of the first respondent null and void on the ground that the nomination papers submitted by the first respondent on 24 February 2008, the nomination day for the constituency, were defective and should have been rejected by the returning officer. He claimed that only the PAS candidate's nomination papers for the constituency were valid and as such the PAS candidate should have been duly returned unopposed without a poll being taken. He prayed that the first respondent ought not to have been returned and that the election of the first respondent was null and void. He further sought a declaration that the PAS candidate be returned as the successful candidate for the constituency.

FACTS AND GROUNDS RELIED ON IN THE ELECTION PETITION

[2] The appellant filed this election petition based on the grounds set out in s 32(b) of the Act, read with regs 4(5), 4(6), 7(3) and 7(4) of the Elections (Conduct of Elections) Regulations 1981 ('ECER'). In the election petition the appellant had pleaded in para 4.1 that the first respondent failed to sign two out of the three copies of the nomination papers which should be submitted in triplicate to the returning officer, the second respondent which failure was in violation of reg 4(5) of the ECER. In para 4.2 of the election petition, the appellant also stated that the second respondent failed to use his powers provided by reg 4(6) of the ECER to reject the nomination papers of the first respondent for the said failure to sign the two nomination papers. In para 4.3 of the election petition the appellant further stated that the second respondent should have himself lodged an objection pursuant to reg 7(3) of the ECER against the nomination papers of the first respondent on her failure to sign the said nomination papers. He also alleged that the second respondent failed to keep a written record of the decision to reject the appellant's objections against the nomination papers of the first respondent pursuant to reg 7(4) of the ECER.

[3] For easy reference in discussing the issues before us we would herein reproduce the relevant provisions of the Act, the ECER and the Election Petition Rules 1954 ('EPR'). Section 32 of the Act provides as follows:

Avoidance of election on election petition

32 The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

(a) that general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those before enumerated or not have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) that the candidate was at the time of his election a person disqualified for election.

[4] Regulation 4 of the ECER provides as follows:

4 Nomination papers

(1) Any person eligible for election as a member of the Dewan Rakyat, or of the Legislative Assembly of a State, in accordance with the Constitution of Malaysia, or the Constitution of a State, as the case may be, may be nominated as a candidate for election.

(2) The nomination of any other person shall be void.

(3) Candidates shall be nominated by means of nomination papers which shall be as set out in Form 4 or 4A, as the case may be, in the First Schedule. Such nomination papers shall be submitted in triplicate.

(4) Each nomination paper shall be completely and correctly filled in the national language and shall state —

A (a) the name of the constituency in which the candidate seeks election;

(b) in the case of election to a State Legislative Assembly, the name of the State concerned;

B (c) the full name, other names, if any, identity card number, occupation, if any, and residential address of the candidate, and the candidate's correspondence address to which documents relating to the election may be sent;

C (ca) the candidate's name or names which he desires to be printed on the ballot paper, and for this purpose he may omit or specify by initials only his name or any of the names or any part of his name or names;

D (d) the name and identity card number of the proposer and seconder, whose names must appear in the electoral rolls for the time being in force for the constituency for which the candidate seeks election; and

E (e) the name, identity card number and address of the witness in the presence of whom the candidate affixes his signature.

(5) Each nomination paper shall also bear the signature of the candidate and of all the persons mentioned in paragraphs (4)(d) and (e).

F (6) Failure to comply with subregulation (3), (4) or (5) shall render the nomination paper liable to be rejected by the returning officer.

(6A) Notwithstanding subregulation (6), a nomination paper shall not be rejected on account of —

G (a) any error or omission in the nomination paper in relation to the description of, or any particulars in respect of —

(i) the candidate; or

(ii) his proposer or seconder;

H If the particulars contained in the nomination paper are sufficient to identify the candidate or his proposer or seconder, as the case may be;

(b) any omission in stating the candidate's name or names to be printed on the ballot paper;

I (c) any error or omission with regard to any place specified in the nomination paper, if such place is otherwise sufficiently identifiable from the particulars given in the nomination paper;

(d) any error or omission which is capable of being corrected and is corrected upon being brought to the attention of the person presenting the nomination paper; or

(e) any clerical or printing error in the nomination paper if the error is not of any material significance or does not affect —

(i) the identification of the candidate, his proposer or seconder; or

(ii) the identification of the constituency in respect of which the nomination paper is delivered.

(6B) Where in a nomination paper there is an omission in stating the candidate's name or names which is or are to be printed on the ballot paper, then the name to be printed in the ballot paper shall be the full name of the candidate as stated in accordance with paragraph (4)(c).

(7) Every candidate shall at the time of his nomination and in the manner described in subregulation 6(2), deliver to the returning officer the original copy of a statutory declaration of his qualifications made and subscribed by him as set out in Form 5 or 5A, as the case may be, in the First Schedule and a deposit or deposit receipt as in subregulation 5(1).

(8) The returning office or the State Elections Officer shall, at any reasonable time between the date of the notice of election referred to in regulation 3 and before ten o'clock in the forenoon on the day of nomination, supply a set of nomination papers and statutory declaration to any person or political party applying for the papers, each set consisting of three copies of Form 4 or 4A and a copy of Form 5 or 5A, as the case may require, on payment to the returning officer or the State Elections Officer of a fee of twenty ringgit for a set of the papers.

[5] Regulation 7 of the ECER provides as follows:

7 Objection to nomination papers

(1) Objection may be made to a nomination paper by any person whose name appears in the electoral rolls for the constituency and by any candidate for the constituency on all or any of the following grounds but on no other ground, namely —

(a) that the particulars of the candidate are insufficient to identify the candidate;

(b) that the nomination paper does not comply with or was not delivered in accordance with these Regulations: Provided that no

objection shall be made under this paragraph in respect of any matter which, by virtue of subregulation 4(6A), does not render a nomination paper liable to be rejected:

(c) that it is apparent from the contents of the nomination paper that the candidate is not capable of being elected as a member of the Dewan Rakyat or a State Legislative Assembly;

(d) that the candidate is disqualified from being a member under the Constitution of Malaysia in the case of an election to the Dewan Rakyat or of the Constitution of the State concerned in the case of an election to a State Legislative Assembly.

(2) No objection to a nomination paper shall be allowed unless it is made to the returning officer between ten o'clock and eleven o'clock in the forenoon on the day of nomination.

(3) Every objection shall be in writing signed by the objector and shall specify the grounds of objection. The returning officer may himself lodge an objection on any of the grounds set out in subregulation (1).

(4) The returning officer shall with the least possible delay after eleven o'clock in the forenoon on the day of nomination decide on the validity of every objection and inform the candidate concerned or his proposer or seconder named in the nomination paper provided for in subregulation 4(3) or the objector mentioned in subregulation (1) of his decision and the grounds thereof. Such decision and the grounds thereof shall be kept on record.

(5) The decision of the returning officer shall be final and conclusive for the purpose of the election in respect of which the proceedings are being held, and shall not be called in question in any court:

Provided that any person aggrieved by the decision of the returning officer may present an election petition in respect thereof on the grounds set out in paragraph 32(b) of the Election Offences Act 1954, and the provisions of the said Act shall take effect accordingly.

[6] Rule 4(1) of the EPR provides as follows:

4 Contents and Forms of election petition

(1) An election petition shall contain the following statements:

(a) it shall state the right of the petitioner within section 34 of the Act.

(b) it shall state the holding and result of the election and shall briefly state the facts and grounds relied on to sustain the prayer.

RETURNING OFFICER'S DECISION ON NOMINATION DAY

[7] The first respondent together with her proposer and seconder delivered her nomination papers in triplicate at the place of nomination within the time stipulated pursuant to reg 6(2) of the ECER. The first respondent had only signed one of the papers but did not sign the remaining two papers as required by reg 4(5) of the ECER.

[8] The appellant thereafter lodged with the second respondent, the returning officer an objection against the nomination papers of the first respondent pursuant to reg 7(2) of the ECER on the ground that the first respondent had not signed the nomination papers. The returning officer dismissed the objection pursuant to reg 7(4) of the ECER and proceeded to declare a contest between the first respondent and the PAS candidate for the constituency of Kuala Kangsar.

THE APPLICATION TO STRIKE OUT THE ELECTION PETITION AND PRELIMINARY OBJECTION

[9] The second and third respondents filed a notice of motion praying that the election petition be struck out with costs on the ground that the election petition is defective for failure to comply with r 4(1)(b) of the EPR. It is the contention of the second and third respondents that the facts and grounds raised are unable to sustain the prayers sought. The first respondent meanwhile filed a notice of preliminary objection raising issues and grounds similar to the notice of motion filed by the second and third respondents. Having heard the submission of learned counsel for the first, second and third respondents and the appellant, the learned election judge came to a finding that the election petition was defective as the appellant had failed to satisfy the requirement of r 4(1)(b) of the EPR read with s 32(b) of the Act. The learned election judge in the circumstances of the case struck out the petition without going for trial.

DECISION

[10] It is to be noted at the outset that the election judge has the jurisdiction to strike out an election petition that is defective without the need to go through the process of a full hearing. This point has been settled by this court following a long line of authorities in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 and recently reaffirmed in the case of *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473 wherein the court ruled that a defective election petition includes the following:

(a) failure to comply with the mandatory requirements of r 4(1)(b) of the EPR which require the petition to state the facts and grounds to sustain the prayers sought;

(b) failure to relate or associate the complaints advanced with the provision of election laws alleged to have been transgressed; and

(c) failure to set out the facts complying with the twin requirements of s 32(b) of the Act so as to have a cause of action sufficient to sustain the prayers sought.

[11] The twin requirements of s 32(b) of the Act as stated by the Federal Court in *Gan Joon Zin*'s case are that firstly, there has been a non-compliance with the provisions of any written law relating to the conduct of any election; and secondly, that such non-compliance affected the result of the election.

[12] We are of the view that by virtue of regs 7(1), 7(4) and 7(5) of the ECER, three matters must be satisfied by a petitioner to sustain an election petition:

(i) only the decision of the returning officer accepting or rejecting an objection can be questioned in the petition;

(ii) the objection must be of a type that falls within the provisions of reg 7(1); and

(iii) the facts satisfying the twin requirements of s 32(b) of the Act must be stated.

[13] In the present case it is our judgment that even assuming the transgressions of election law relating to the conduct of elections as alleged by the appellant are true, such non-compliance had not affected the result of the election and therefore the second requirement of s 32(b) of the Act is not satisfied. The election was held in accordance with the principles of election law and the alleged non-compliance had not affected the result of election which is the success of one candidate over the other in a free election where the electorate voted freely according to their preference. This is because the two candidates were put up for election and the whole electorate was given their constitutional right and a chance to vote for the candidate of their choice in a secret ballot election which was fair and free (see the cases of (1) *Isahak Hamid v Mustapha* [1965] 2 MLJ 18 and (2) Federal Court case of *Wong Chong Sang v Nga Kor Ming* Civil Appeal No 01–24 of 2004(A) (unreported)).

[14] We also agree with the finding of the learned election judge that the petition is by itself defective as the mandatory requirements of r 4(1)(b) of the EPR are not met. Paragraph 4.2 of the appellant's election petition is totally silent on whether the returning officer had exercised his discretion wrongly. The appellant argued that the returning officer should have rejected the first respondent's nomination merely on the fact that two copies of the

nomination papers were not signed. To us this is insufficient fact to sustain the prayer sought as the law does not impose on the returning officer such an obligation to only reject but confers a discretion whether to accept or reject. On this point we take the view that the words 'liable to be rejected' in reg 4(6) of the ECER expressly confers a discretion on the returning officer whether to accept or reject a nomination paper (see the case of *Hussein bin Ahmad v Tengku Razaleigh bin Tengku Mohd Hamzah & 3 Ors* (Kota Bharu High Court Election Petition No 33–6 of 1995) Tunku Sofiah's *Malaysian Election Laws*).

[15] In spite of the presence of the first respondent's signature in one of the nomination forms, the appellant contended that the absence of her signature in the other two forms reflected that the first respondent did not consent to her nomination as a candidate of the constituency. On this issue it is to be noted that in the present case the first respondent came personally to hand over her nomination papers to the returning officer. This fact signifies her intention to accept the nomination to contest as a candidate for the constituency. The returning officer is entitled to look at the nomination paper that is correctly filled up to identify the defect and determine whether that defect is substantial in nature or otherwise. The returning officer found the defect not to be of a substantial nature. In para 16 of the affidavit filed by the returning officer, as the second respondent before the election judge he had said that he was satisfied beyond any doubt that the first respondent had consented to be nominated as a candidate as follows:

> Saya berpendapat dan berpuashati bahawa ketinggalan tandatangan Dato' Seri Rafidah Aziz dalam dua kertas penamaan calon tersebut tidak memberi apa-apa kesan kerana satu daripada tiga kertas penamaan calon itu adalah lengkap dan teratur. Kertas penamaan calon yang lengkap dan teratur ini adalah juga suatu kertas penamaan calon dan ianya dengan jelas menunjukkan niat Dato' Seri Rafidah Aziz untuk menerima penamaan sebagai calon untuk kerusi Parlimen Kuala Kangsar. Saya berpendapat dan berpuashati bahawa kertas penamaan calon Dato' Seri Rafidah Aziz tidak wajar ditolak atas alasan bahawa dua lagi kertas penamaan calon tidak ditandatangani.
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> (See p 97 of the appeal record).

[16] Based on the above explanation of the returning officer we are of the view that the returning officer had exercised his discretion judiciously in accepting the nomination papers of the first respondent. In our view the supporting documents presented together with the nomination papers are sufficient and cogent evidence that the first respondent consented to her nomination as a candidate for the constituency. The supporting documents are the receipts from the State Election Office, being the deposit as a candidate for a parliamentary seat (receipt No 183680 for RM10,000) and the deposit for election campaign materials (receipt No 183681 for

RM5,000) both paid on the 22 February 2008. The other documents are the certificate to use the symbol of BN in the election and the executed Form 5 dated 22 February filed two days before the nomination day.

CONCLUSION

[17] For the reasons above stated it is our unanimous decision that this appeal should be dismissed with costs. We would also order that the deposit be paid to the first, second and the third respondents to account for taxed costs and confirm the orders made by the learned election judge.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon